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NO. 955

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

YOUNG & COMPANY OF HOUSTON, *Petitioner*

vs.

ROBERT S. CALVERT, AS COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS, *Respondent*

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondent Robert S. Calvert, Comptroller of Public Accounts of the State of Texas, as representative of the State of Texas and represented herein by the Attorney General of the State of Texas, opposes the granting of the petition for writ of certiorari because the state appellate courts below have correctly decided the very questions raised by the petition and no substantial federal question is presented.

STATEMENT OF THE CASE

In addition to the brief statement appearing in the petition, the following supplemental statement is made to assist the court in a proper evaluation or review of this case. Petitioner has no permit to do business elsewhere than in Texas, wherein it is chartered. Its business is all transacted within Houston, Harris County,

Texas (S.F. 6-7). It purchases its supplies within Texas and it makes its contracts with its longshoremen and rents all of its materials handling equipment and pallets within Texas from other Texas concerns as intrastate transactions. It also transacts various other business within that state. (S.F. 24). All of the stevedoring services were carried on in the City of Houston, Texas; and before any stevedoring services were contracted or performed, Petitioner rented or leased the matrials handling equipment from local concerns as separate local transactions. (S.F. 11-12). The property is maintained and utilized in Houston and never leaves there. (S.F. 17). It is the cargo itself which is subsequently loaded by the use of the equipment which constitutes the foreign commerce destined for foreign ports. (S.F. 20).

NO SUBSTANTIAL FEDERAL QUESTION PRESENTED

The issue raised by Petitioner is simply whether the Texas Limited Sales, Excise, and Use Tax, a transactions tax, may constitutionally be levied upon a local taxable event, the lease made and the rentals paid thereby, by a domestic stevedoring company to certain Texas concerns in order to lease machines and equipment for subsequent use in the stevedoring company's loading or unloading operations of vessels engaged in foreign commerce. Petitioner contends that because the business of loading or unloading vessels by stevedore companies engaged in foreign commerce has been declared to be foreign commerce, a state is not at liberty to tax any economic transaction entered into by the stevedoring company preparatory and necessary to its subsequent services at the dock of loading or unloading; that is, a sale or lease of equipment or supplies

needed for use in merely loading or unloading such commerce.

The materials handling equipment and pallets which are the subject of sale or lease remain at all times in Texas and is neither an "import" nor "export." It is not commerce; it is merely useful and necessary in engaging in interstate or foreign commerce. Petitioner's contention, however, is that because it is essential to the performance of its stevedoring operations, they thereby become an integral and inseparable part of the foreign commerce, rendering their sale or lease immune from non-discriminatory state taxation.

It is apparent from Petitioner's brief that no court decision has ever been handed down in support of such a contention. In fact, all of the cases appear to hold uniformly that the showing of necessary use or employment of property in interstate or foreign commerce will not of itself render it immune or exempt from nondiscriminatory state taxation. 51 Am Juris 267, Taxation, Sect. 206; *Eastern Air Transport, Inc. v. South Carolina Tax Commission,* 285 U.S. 147, 152-153 (1932).

PETITIONER'S CASES DISTINGUISHED

The six cited cases in Petitioner's application do not support its contention in this respect and are all readily distinguishable from the case at bar. Both the cases of *Joseph v. Carter & Weekes Stevedoring Co.,* 330 U.S. 422 (1947), and *Puget Sound Stevedoring Co. v. Tax Commission of the State of Washington,* 302 U.S. 90 (1937), involved occupation taxes based on gross receipts of the stevedoring businesses imposed directly on the privilege of doing such business. This Court merely held in these two cases that a state was

not at liberty to tax the privilege of doing interstate or foreign commerce (interstate or foreign commerce business of loading and unloading) by exacting in return therefore a percentage of the gross receipts. The tax involved in the case at bar is a sales tax upon a local, independent, separable economic activity and transaction, removed from the flow of foreign commerce and merely preparatory to subsequent loading and unloading operations yet to be performed. The tax is on the sale or lease made, which was the taxable event and a completed transaction before the export process began, and not on the use that the materials handling equipment and pallets were thereafter put to foreign commerce. The character of the tax is held to be upon certain general but specified transactions engaged in by everyone, *Calvert v. Canteen Co.*, 371 SW 2d 556 (Tex. Sup.Ct. 1963); it was not a tax upon the right or privilege of engaging in a business, as were the gross receipt taxes which this Court found was an unreasonable burden on interstate commerce. In the case at bar, no burden whatever on such commerce is shown or demonstrated—much less an unreasonable burden! These cited cases had nothing to do concerning the Export-Import Clause contention of Petitioner but involved only the Commerce Clause. They did not even hold that a state occupation tax could not be validly imposed on stevedoring itself. The *Puget Sound Stevedoring Company* case, supra, specifically held in part that the stevedoring business of supplying longshoremen, without directing or controlling their work of loading or unloading, ". . . is not interstate or foreign commerce, but rather a local business and subject . . . to taxation by the state." The Court likened this ". . . to that of a labor or employment bureau." 58 S.Ct. 74. Surely the sale or rental of equipment, cranes, and

pallets in the case at bar are as much outside the flow of commerce as the labor or employment bureau mentioned by the Supreme Court!

The cases of *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69 (1946) and *Empresa Siderurgica v. County of Merced, California*, 337 U.S. 153 (1949), are not analogous and are clearly distinguishable. These holdings relate to a tax directly on the export commodity itself or on the export process itself. In the *Richfield* case, supra, the State of California sought to levy a tax on the sales of oil sold by the taxpayer to the New Zealand government. The taxable event as assessed was the transfer of the oil by pumps from a harbor storage tank into tankers bound for New Zealand. The taxable event in the case at bar, however, was the lease of the dock equipment. Thus, if the Supreme Court in the *Richfield* case, supra, had held that a sales tax on the pumps was a violation of the Export-Import Clause, then it would be good authority for Petitioner's claim.

The same consideration applies to the case of *Empersa Siderurgica v. County of Merced, California*, supra. There a Columbian corporation had purchased a cement plant in California for the purpose of disassembling and transporting it to a point out of the United States. Before it was disassembled, however, the county assessed a property tax. The Court held that there was no violation of the Export-Import Clause and as in *Richfield*, that an article of commerce is not an export *until* actually shipped to a foreign port. Thus, as applied to Petitioner's equipment and cranes, they would be taxable since they were *never* bound for a foreign point. The "holding" in this case (cited on page 9 of Petitioner's petition) is only rank

dicta. In any event, the taxation of the use of the cranes and equipment does not tax the process of exportation. No doubt the quotation refers to a general occupation tax in referring to the process that may not be taxed. True, the cranes are a means by which exportation is facilitated. But the *indirect* taxation of the means is a far different matter from the *direct* taxation of the process itself.

A. G. Spalding & Bros. v. Edwards, 262 U.S. 66 (1923) is also of no help to Petitioner. In that case, a foreign corporation, desiring to purchase a large shipment of baseballs and baseball bats, authorized a New York brokerage firm to secure them. The brokerage firm instructed the Spalding Co. to deliver them up for shipment. The Supreme Court accordingly held the goods nontaxable. The obvious distinction between the *Spalding* case and the one at bar is that the merchandise there was actually being exported, while the cranes and equipment in this case are not. Indeed, New York sought to tax a step in the process of exportation—the delivery of goods to the consignee. On the other hand, Texas seeks to tax the lease rentals paid for the equipment, which is clearly outside of the exportation process.

Least in point is *Crew Levick Co. v. Commonwealth of Pennsylvania,* 245 U.S. 292 (1917). In that case, the Supreme Court struck down a general merchandising tax based on sales. The statute there was extremely broad, unlike the Texas statute which is narrow and specific. Accordingly, the Court said at page 297: "[The statute] operates to levy a direct burden upon every transaction in commerce by withholding for the use of the state, a part of every dollar received on such transaction." This likewise points out the dis-

tinction between the taxation of the means of exportation and the taxation of the actual process itself. A tax as broad as the Pennsylvania tax is clearly the taxation of the process, since the receipts are derived in part from stevedoring income and the tax thereon fluctuated according to the volume of commerce. But the taxation of the dock crane and equipment presents a different question, for the tax here would still be due if the materials handling equipment were never used to load the ship. The tax becomes due when the lease arrangement is made, not when the ships are subsequently loaded or unloaded.

RESPONDENT'S AUTHORITIES SUPPORT HIS POSITION

The Texas Sales Tax is not unconstitutional, being "a general tax, laid on all property, alike, and not levied on goods in course of exportation, nor because of their intended exportation. . . ." *Turpin v. Burgess,* 117 U.S. 504, 507 (1886). It is nondiscriminatory and less onerous than the New York Sales Tax, upheld by this Court, which declared: "Equality is its theme. . . ." *McGoldrick v. Berwind-White Coal Mining Co.,* 309 U.S. 33, 42, et seq. (1940). In the latter case, the sales tax was upheld on local purchases or transactions despite the fact that the property had just traveled in interstate commerce. This Court has likewise held that such a tax may be levied upon an intrastate transaction although the property sold or delivered is to be forthwith shipped out of the state. *Dept. of Treasury of State of Indiana v. Wood Preserving Corp.,* 313 U.S. 62, 68 (1941).

This Court long ago upheld a state tax on the sale of fuel to airplanes engaged in interstate commerce, it being immaterial that the property was necessary

to be used in such commerce by the interstate carrier. This Court correctly reasoned that the tax was upon the transaction and the general mass of property within the state, as distinguished from the aspect of the carrier's subsequent use of the property. *Eastern Air Transport, Inc. v. South Carolina Tax Comm.*, supra, 285 U.S. 147, 152.

In addition, this Court has made it clear that a state is at liberty to tax the "use" to which the fuel is put in withdrawing it from storage within the state and placing it in the tanks of planes, although it be conceded that its ultimate purpose or function is to generate motive power for carrying on interstate commerce . . . "[so long as the tax] falls short of a tax directly imposed on its use in interstate commerce." *Edelman v. Boeing Air Transport*, 289 U.S. 249, 252 (1933).

Since it is clear that the Texas Limited Sales, Excise, and Use Tax is imposed on the lease price of the equipment and pallets (and not directly on their use in interstate or foreign commerce), Petitioner's contention must of necessity be dismissed as falling short of raising a substantial federal question. The tax involved is not on the privilege of engaging in business and is clearly outside the actual process of exportation. *Shell Oil Co. v. State Board of Equalization*, 414 P2d 820 (Cal. Sup. Ct. 1966), appeal to the U.S. Sup. Ct. filed Dec. 14, 1966, Docket No. 863.

In *Shell Oil Co.*, supra, the California Sales Tax, like the Texas tax here involved, assessed a tax on the sale of bunker fuel oil to vessels engaged in interstate and foreign commerce. Shell made exactly the same argument as Petitioner, but the Court rejected it and upheld the tax on the property as neither a discrimina-

tion against nor an unreasonable burden upon interstate commerce. Declaring the tax to be levied upon a subject related to but nevertheless severable from articles of export, and the transaction not to be a part of the "process of exportation," the Court held that this process under the import-export clause ". . . begins when the goods are committed to the common carrier for transportation out of the state to the state of their destination, or have started on their ultimate passage to that state." 414 P2d 824.

The holding is clearly applicable to the Texas tax on the lease transaction of the materials handling equipment. Petitioner's argument, like Shell's contention, that the tax in effect was upon an instrumentality, service, product, or process of interstate or foreign commerce because absolutely essential and necessary to the carrying on of such commerce was rejected as meritless as follows:

> "The acceptance of such a contention would lead back to every forest, mine, and factory in the land and create a zone of tax immunity never before imagined! (Canton R. Co. v. Rogan, supra, 340 U.S. 511, 515). Such a broad and all-embrasive interpretation of the export clause has never been accepted. (See e.g., Canton R. Co. v. Rogan, supra, 340 U.S. 511, 71 S. Ct. 447; Empresa Siderurgica v. City of Merced, supra, 337 U.S. 154, 69 S. Ct. 995; Joy Oil Co. v. State Tax Commission (1949) 337 U.S. 286, 69 S.Ct. 1075, 93 L.Ed. 1366; Peck & Co. v. Lowe (1918) 247 U.S. 165, 38 S.Ct. 432, 62 L.Ed. 1049; Cornell v. Coyne (1904) 192 U.S. 418, 24 S.Ct. 383, 48 L.Ed. 504; Pittsburgh & S. Coal Co. v. Bates (1895) 156 U.S. 577, 15 S.Ct. 415, 39 L.Ed 538; Coe v. Town of Errol, supra, 116 U.S. 517, 6 S.Ct. 475.) In the *Canton* case a tax measured in large part by the gross receipts

of a common carrier of export freight in the port city of Baltimore was upheld against import-export clause challenges. So, too, the court sustained a tax on operations involving freightage of export goods to the port. (Western Maryland R. Co. v. Rogan, (1951) 340 U.S. 520, 71 S.Ct. 450, 95 L.Ed. 501.)" 414 P2d 825.

Finally, the cases are uniform in upholding the constitutionality of a sales tax in its incidence upon the transaction of a sale or lease of cranes and other materials handling equipment intended to be used for loading or unloading vessels or other interstate or foreign carriers. *Canton Co. of Baltimore v. Comptroller of Treasury,* 231 Md 294, 190 A2d 92 (1963); *Mohegan International Corp. v. City of New York,* 9 N.Y.2d 64, 172 N.E.2d 546 (1961); *Commonwealth of Pennsylvania Board of Finance and Revenue v. Northern Metal Co.,* 204 A2d 467 (1964), cert.den. 85 S.Ct. 1026.

CONCLUSION

Respondent asks that the petition for writ of certiorari be denied, because the question raised in the petition was correctly decided by the Supreme Court of Texas, in unqualified approval of the Opinion of the Austin Court of Civil Appeals, and clearly no substantial federal question is presented in this Court.

Respectfully submitted,

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PROOF OF SERVICE

I, Kerns B. Taylor, attorney for Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 1st day of February 1967, I served two copies of the foregoing Brief In Opposition to Petition For Writ of Certiorari on Robert Eikel, Attorney for Petitioner, by mailing such copies in a duly addressed envelope, with first air mail postage prepaid, at the address of 205 Oil & Gas Building, Houston, Texas 77002.

Kerns B. Taylor
KERNS B. TAYLOR